

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

April 27, 2012

Mark J. Cutrona, Esquire
Department of Justice
114 East Market Street
Georgetown, DE 19947

Joseph A. Hurley, Esquire
1215 King Street
Wilmington, DE 19801

Re: State v. Wade Bowersox
Def. ID# 1107022570

Date Submitted: February 29, 2012
Date Decided: April 27, 2012

Dear Counsel:

Having had the opportunity to review my notes, the transcript, as well as the arguments you have offered as to your respective positions, I have determined that the suppression motion should be denied.

Initially, I find that there was at least articulable suspicion or reasonable grounds for the vehicle stop. Officer Derrick Calloway noted the passenger did not have his seat belt on when the vehicle passed him. He confirmed this fact when he was behind the vehicle. When Officer Calloway stopped the vehicle, he noted the passenger's seat belt was still not engaged. Officer Calloway also noted that the driver did not use a turn signal when he made a left turn into the Discount Land, or Tyndall's Furniture, parking lot.

The next question is whether or not probable cause existed for Officer Jared Haddock to take Mr. Bowersox into custody for further testing and his arrest. The standard for this Court to review probable cause may be found in *Miller v. State*, 4 A.3d 371 (Del. 2010), wherein Chief Justice Steele stated the following:

We determine probable cause by the totality of the circumstances, as viewed by a reasonable police officer in the light of his or her training and experience. To establish probable cause, the police need only present facts suggesting, in the totality of the circumstances, that a fair probability exists that the defendant has committed a crime. A finding of probable cause does not require the police to uncover information sufficient to prove a suspect's guilt beyond a reasonable doubt or even to prove that guilt is more likely than not.

Id. at 373-74 (internal quotation marks and citation omitted). In reaching this decision, I have had to make certain credibility determinations as to what was communicated by Mr. Bowersox on the night of his arrest. The police officer testified that he asked Mr. Bowersox if he was able to perform the physical field tests. The officer reported Mr. Bowersox said he was able to perform the tests and had no injuries. On the other hand, Mr. Bowersox testified he told the officer that his knees were not very good and he had a hurt back. He said he quit one test because his "legs were just worn out for the day," but he did not testify he communicated that alleged fact to the officer. Nor did Mr. Bowersox relay to the officer that he had been in an accident when he was in his twenties. For purposes of impeachment and recollection, Mr. Bowersox stipulated that his blood alcohol content was .10% that evening. Of course, the Court must review the decisions made that night based on what the officer knew that night and not what is learned later at the suppression hearing. *See Miller v. State*, 4 A.3d at 374. Based on the testimony of both witnesses, I am satisfied that the officer's recollection is more accurate.

With this said, I find that the following evidence, as viewed by a reasonable police officer under the totality of the circumstances standard, establishes probable cause due to the following facts:

- (a) Mr. Bowersox committed a moving violation.
- (b) Mr. Bowersox performed poorly on the walk and turn test. The officer reported he explained and demonstrated this test to Mr. Bowersox. Mr. Bowersox missed the heel to toe and missed the line on several steps.
- (c) Mr. Bowersox performed even worse on the one-legged stand test before ultimately quitting. He put his foot down at number 5 and number 11. Mr. Bowersox put his foot down for good and quit at number 19. The officer observed Mr. Bowersox swaying at number 10.

(d) When initially stopped, Mr. Bowersox told Officer Calloway that the odor of alcohol was due to the passenger's consumption thereof. He reported a celebration or event had taken place that evening. When asked specifically, Mr. Bowersox denied drinking. When removed from the vehicle, Mr. Bowersox told Officer Haddock the odor of alcohol was from his passenger, but then said he had consumed a 16- or 18-ounce beer.

(e) Although Officer Calloway testified that he did not initially notice anything remarkable about Mr. Bowersox's eyes (Question by defendant's counsel: "And at that point, had you noticed anything remarkable about Mr. Bowersox's eyes?" Answer: "No."), Officer Haddock, who had conversations with Mr. Bowersox and conducted the field tests, noted Mr. Bowersox's eyes were glassy and bloodshot.

(f) Neither the HGN test nor the PBT test results were admitted. Thus, they were not supportive of the State's position.

I fully understand and appreciate defense counsel's arguments that the police candidly reported matters supporting the defendant's position, but "mixed results in field sobriety tests do not extinguish probable cause if other sufficient facts are present." *Perrera v. State*, 2004 WL 1535815 (Del.). The above noted facts are sufficient to establish probable cause.

Mr. Bowersox's suppression motion is denied. IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

ESB:tl

cc: Prothonotary's Office